No. 3665

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BINGER STEWART HERINE, also known as BINGER STEWART HORINE,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

CHAUNCEY F. TRAMUTOLO,
Attorney for Plaintiff in Error.

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Statement of the Case.

The plaintiff in error was charged by an information filed June 22, 1920, in the Southern Division of the United States District Court for the Northern District of California, with violating the act commonly known as the National Prohibition Act. The information, which will be found at pages 2-7 of the Transcript of Record, is in three counts. The charging part of the first count alleges that the defendant, on the 20th day of June, 1920, at San Francisco, in the County of San Francisco, in the Southern Division of the Northern District of California, after the date upon which

the Eighteenth Amendment to the Constitution of the United States went into effect, had unlawfully, wilfully and knowingly, in violation of Section 21 of Title II of the Act of October 28, 1919, known as the National Prohibition Act, maintained a common nuisance, in that he did unlawfully, wilfully and knowingly *keep* on the premises situated at 457 Ellis Street, known as Summerville Apartments, to-wit, Rooms 3, 4 and 5, certain intoxicating liquor, to-wit, sherry wine and port wine, containing one-half of one per cent or more alcohol by volume, and then and there fit for use for beverage purposes.

The second count charges the defendant with a sale of the said liquor, made at the aforesaid place, on the 19th day of June, 1920, and the third count charges a sale alleged to have been made on the following day.

Prior to the trial of the cause, the plaintiff in error, by his attorney, filed a petition for the return of the liquor seized in the defendant's apartments on the evening of his arrest, upon the ground that the liquors were the lawful property of the defendant, and were taken from his bona fide and lawful domicile without a search warrant or other legal process. (Transcript, pages 9-13.)

An order to show cause was issued by the trial judge, to which the United States Attorney filed two separate returns, which will be found at pages 16 and 19 respectively of the transcript. A hearing was had upon the petition, and the return

thereto, and it was ordered by the court that the order to show cause be discharged, and the petition denied. (Transcript, page 25.)

At the trial of the cause, the liquor taken from the defendant's apartment was introduced in evidence. The jury returned a verdict finding the defendant guilty on Count One, the count charging the maintaining of a common nuisance, and not guilty on Counts Two and Three, which charged the making of sales. (Transcript of Record, page 28.) Thereafter, the defendant interposed motions for a new trial and in arrest of judgment, (pages 58-61) which were denied by the court, and judgment was thereupon pronounced that the defendant be imprisoned in the county jail of the City and County of San Francisco for a period of three months. Thereafter a writ of error was duly allowed and issued, which brings the record before this court.

Specification of Errors.

In seeking a reversal of this judgment, the plaintiff in error relies upon the following errors committed by the trial court:

(1) That the trial court erred in denying the petition of the plaintiff in error for the return of the liquor illegally seized in his domicile, without a search warrant or other legal process.

(2) That the count of the information upon which the plaintiff in error was convicted does

not state facts sufficient to charge the plaintiff in error with having committed any crime or offense against the laws of the United States, and that, therefore, the trial court erred in denying the plaintiff in error's motion in arrest of judgment.

(3) That the evidence introduced and received at the trial of this cause was wholly insufficient to justify a verdict of guilty, and that the trial court, therefore, committed error in denying the motion to set aside the verdict and grant a new trial.

Brief of the Argument.

I.

THE TRIAL COURT COMMITTED ERROR IN DENYING THE PETITION OF THE PLAINTIFF IN ERROR TO RETURN THE LIQUOR ILLEGALLY SEIZED.

There is no controversy over the fact that the liquor taken from the apartment of the plaintiff in error was seized by the arresting officers without a warrant or other legal process. The only attempted justification for the seizure in this manner is set forth in the second return to the order to show cause, in the following words:

> "That on the 20th day of June, 1920, at the hour of 1:30 o'clock A. M. of said day, Harvey A. Delign, as such officer, received a telephone call from the Summerville Apartments, located at 457 Ellis Street, City and County of San Francisco, California, informing him that the peace and quiet of the occupants of said apartments were being disturbed by loud and bois-

terous noises made by persons in rooms 3, 4 and 5 of said apartments, and that intoxicating liquors were then and there being sold unlawfully in said rooms. That in response to said call and information said Harvey A. Delign, accompanied by other police officers of the said city and county, immediately went to rooms 3, 4 and 5 of said Apartments and found the door of said rooms wide open, and in plain view saw bottles of intoxicating liquor and numerous glasses for serving intoxicating liquors, and then and there heard loud and boisterous noises being made by occupants of said rooms, and thereupon said Harvey A. Delign, and said other officers entered said rooms and found therein five men and three women, one of which said men was defendant herein, and each and all of said men and women were then and there under the influence of intoxicating liquor to the extent of being drunk, noisy and boisterous, disturbing the peace and quiet of the occupants of said Summerville Apartments. That then and there in said rooms, and in plain view of said Harvey A. Delign, and said other officers there were numerous bottles and three (3) kegs containing sherry and port wine containing one-half of one per cent or more of alcohol by volume and fit for use for beverage purposes. That the said defendant then and there and in the presence of said Harvey A. Delign, and the said other officers furnished and delivered to four (4) of said five men and to said three women a part of the said wine and the same was then and there by said men and women drunk. That the said defendant then and there said to Harvey A. Delign and to said other officers that he was selling said wine. That two of the said men to whom said defendant furnished and delivered the said wine then and there and in the presence of defendant said to said Harvey A. Delign

and said other officers, that they paid to defendant twenty-five cents per drink for said wine. That defendant then and there stated to Harvey A. Delign, that he resided in room 214, of the Adair Hotel located at 445 Ellis Street, in the said City and County of San Francisco, and that he had no permit of any kind to move any of said wine from said hotel to said Summerville Apartments. That thereupon said Harvey A. Delign arrested said defendant and then and there, and at the time of the said arrest, took into his possession, of said wine ten full bottles, one keg full and two partly filled kegs, and of the said bottles some of them contained sherry and some contained port wine, and of the said kegs some contained sherry and some port wine, and all of said wine then and there contained one-half of one per cent and more of alcohol by volume, and was then and there fit for use for beverage purposes, and was then and there in the possession of the defendant and intended by him for use and was then and there being used in violation of Title II of the Act of October 28th, 1919, and known as the 'National Prohibition Act'. That the said defendant, as hereinbefore set out, then and there stated to said Harvey A. Delign, that he, said defendant's, residence was then at 445 Ellis Street, in the said City and County of San Francisco, and upon information thereafter received from the clerk of the hotel located at 445 Ellis Street, that said defendant on the said 20th day of June, 1920, resided at said hotel, the said Harvey A. Delign has reason to believe, and does believe, and upon such information and belief alleges the fact to be, that said defendant's residence on the said 20th day of June, 1920, was at and in the Hotel Adair, 445 Ellis Street, and that defendant on said 20th day of June, 1920, had no bona fide or lawful residence in said

> Summerville Apartments, nor at 457 Ellis Street, in said City and County of San Francisco, California. That John L. Considine, as District Prohibition Officer, or otherwise, has not, nor has any official of the plaintiff herein, ever seized, had in his possession or retained any of the said wine."

Does this return set forth sufficient grounds to have warranted the court in denying the petition for the return of the liquor?

At this juncture it may be well to call the attention of the court to the following considerations:

First: The jury found the defendant *not guilty* of making the alleged *sales* of liquor, and, therefore, that portion of the return must, for the purpose of this argument, be disregarded; *Second*: The return contains no proper denial that the premises in which the liquor was found were the lawful and bona fide residence of the plaintiff in error. It will be noted that the denials contained in the return, that the premises were the defendant's residence, are made upon information and belief only. It is our contention, therefore, that in view of the fact that the liquor was illegally seized, its return to the plaintiff in error should have been ordered, and its admission in evidence at the trial of the case was error.

The question is settled, we submit, by two recent decisions of the Supreme Court of the United States. In Gouled v. United States (No. 250, decided February 28, 1921; Advance Opinions No. 10, page 311), Mr. Justice Clarke says:

"The 4th Amendment reads:

" 'The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

"The part of the 5th Amendment here involved reads:

" 'No person * * * shall be compelled in any criminal case to be a witness against himself.'

"It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524, in Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915 C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319, 40 Sup. Ct. Rep. 182) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of

courts, or by well-intentioned but mistakenly over-zealous executive officers."

Later, in the same decision, we read:

"The prohibition of the 4th Amendment is against all unreasonable searches and seizures; and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be an unreasonable, and therefore a prohibited, search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will in the one case as in the other; and it must therefore be regarded as equally in violation of his constitutional rights."

The last quotation from the Gouled case is decisive of the case at bar, because it settles in favor of the plaintiff in error the contention that may be raised by the Government, that the record does not show any protest against the seizure on the part of the defendant. Certainly a protest would have been of no avail, in view of the fact that the defendant was confronted by several police officers, who made such a show of force that resistance upon his part would have been unavailing.

The case of Amos v. United States, which will be found in the same number of the Advance Opinions, and immediately following the Gouled case, was a

prosecution for violating the Federal Internal Revenue laws, and the Supreme Court had before it the question of the admissibility in evidence of certain whiskey seized by revenue agents from the defendant's house without a warrant. In the Amos case, in which Justice Clarke also wrote the opinion, it is held that even though the petition for the return of the seized liquor was not presented until after the jury was impaneled, it was, nevertheless, error for the trial court to deny such a petition.

In the course of its opinion, the court says:

> "After the jury was sworn, but before any evidence was offered, the defendant presented to the court a petition, duly sworn to by him, praying that there be returned to him described private property of his which it was averred the district attorney intended to use in evidence at the trial, and which has been seized by P. J. Coleman and C. A. Rector, officers of the government, in a search of defendant's house and store 'within his curtilage,' made unlawfully and without warrant of any kind, in violation of his rights under the 4th and 5th Amendments to the Constitution of the United States.
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> "Upon reading of this petition and hearing of the application it was denied, and, exception being noted, the trial proceeded.
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> "Coleman and Rector were called as witnesses by the government and testified: That, as deputy collectors of internal revenue, they went to defendant's home, and, not finding him there, but finding a woman who said she was his wife, told her that they were revenue officers, and had come to search the premises 'for violations of the revenue law;' that thereupon the woman opened the store and the witnesses entered, and in a barrel of peas found a bottle containing not

quite a half-pint of illicitly distilled whiskey, which they called 'blockade whiskey'; and that they then went into the home of defendant, and, on searching, found two bottles under the quilt on the bed, one of which contained a full quart and the other a little over a quart of illicitly distilled whiskey. The government introduced in evidence a pint bottle containing whiskey, which the witness Coleman stated, 'was not one of the bottles found by him, but that the whiskey contained in the same was poured out of one of the two bottles that had been found in defendant's house on the bed under the quilt, as stated.' On cross-examination both witnesses testified that they did not have any warrant for the arrest of the defendant, nor any search warrant to search his house, and that the search was made during the daytime, in the absence of the defendant, who did not appear on the scene until after the search had been made.

"After these two government witnesses had described how the search was made of defendant's home without warrant either to arrest him or to search his premises, a motion by counsel to strike out their testimony was denied and exception noted.

"This statement shows that the trial court denied the petition of the defendant for a return of his property, seized in the search of his home by government agents without warrant of any kind, in plain violation of the 4th and 5th Amendments to the Constitution of the United States, as they have been interpreted and applied by this court in

Boyd v. United States, 116 U. S. 616, 29 L. Ed. 746, 6 Sup. Ct. Rep. 524;

Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117; and in

Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319, 40 Sup. Ct. Rep. 182;

and also denied his motion to exclude such property and the testimony relating thereto, given by the government agents after both were introduced in evidence against him, when he was on trial for a crime as to which they constituted relevant and material evidence, if competent.

"The answer of the government to the claim that the trial court erred in the two rulings we have described is, that the petition for the return of defendant's property was properly denied because it came too late when presented after the jury was impaneled, and the trial, to that extent, commenced, and that the denial of the motion to exclude the property and the testimony of the government agents relating thereto, after the manner of the search of defendant's home had been described, was justified by the rule that, in the progress of the trial of criminal cases, courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained.

"Plainly, the questions thus presented for decision are ruled by the conclusions this day announced in No. 250, Gouled v. United States.

"There is nothing in the record to indicate that the allegations of the petition for the return of the property, sworn to by the defendant, were in any respect questioned or denied, and the report of the examination and appropriate cross-examination of the government's witnesses, called to make out its case, shows clearly the unconstitutional character of the seizure by which the property which it introduced was obtained. The facts essential to the disposition of the motion were not and could not be denied; they were literally thrust upon

> the attention of the court by the government itself. The petition should have been granted; but, it having been denied, the motion should have been sustained.
>
> "The contention that the constitutional rights of defendant were waived when his wife admitted to his home the government officers, who came, without warrant, demanding admission to make search of it under government authority, cannot be entertained. We need not consider whether it is possible for a wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear that, under the implied coercion here presented, no such waiver was intended or effected."

If these two decisions were not sufficient to sustain our contention, we have this further fact in the case at bar; that since the premises were the residence of the plaintiff in error, the taking of liquor *even with a search warrant,* would have been illegal, unless the warrant had been based upon an affidavit setting forth the evidence of sales. This is apparent from the plain provisions of the National Prohibition Act itself, which, drastic though it is to an almost unprecedented degree, yet recognizes that American citizens have some rights which even prohibition enforcement officers should be compelled to respect. Section 25 of Title II of the Act provides in part:

> "No search warrant shall issue to search any private dwelling occupied as such, unless it is being used for the unlawful sale of intoxicat-

ing liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house."

To hold that evidence obtained in this manner is admissible against a defendant prosecuted under the provisions of this Act would be contrary to public policy, and to the most elementary constitutional rights. It is true that the 18th Amendment to the Constitution of the United States, however mistaken it may be as a matter of policy to write sumptuary legislation into the organic law of the land, is, nevertheless, a part, for the time being, of the fundamental law, and as such should be respected and enforced. But it is likewise true that the 4th Amendment to the Constitution is just as much a part of that instrument as the latter amendment, and is just as much entitled to observance, enforcement and respect. If private residences and hotel rooms are to be subject to arbitrary entrance and search by enforcement officials or police officers, all rights of privacy will be abrogated, and the time-honored maxim that one's home is his castle will cease to have any significance. No free people will long brook the espionage of meddling and bureaucratic officials. As Lord Macaulay has justly observed, "One can make shift to live under a tyrant or a debauchee, but to be ruled by a busybody is beyond human endurance."

II.

THE COURT ON THE INFORMATION UPON WHICH THE PLAINTIFF IN ERROR WAS CONVICTED DOES NOT CHARGE ANY CRIME AGAINST THE UNITED STATES.

The charging part of that count of the information upon which the plaintiff in error was convicted alleges:

> "Now, therefore, your informant presents: that
>
> Binger Stewart Herine,
>
> hereinafter called the defendant heretofore, to wit, on the 20th day of June, 1920, at San Francisco, in the County of San Francisco, in the Southern Division of the Northern District of California, after the date upon which the Eighteenth Amendment to the Constitution of the United States went into effect did unlawfully, wilfully and knowingly, in violation of section 21 of Title II of the Act of October 28, 1919, known as the 'National Prohibition Act,' maintain a common nuisance in that he did unlawfully, wilfully and knowingly keep on the premises situated at 457 Ellis Street, known as Summerville Apartments, to wit, Rooms 3, 4, and 5 certain intoxicating liquor, to wit, sherry wine, and port wine containing one-half of one per cent or more alcohol by volume, and then and there fit for use for beverage purposes." (Transcript, pages 3-4.)

This count of the information is absolutely insufficient for two reasons:

(a) The information does not allege that the liquor kept on the premises therein described was kept by the defendant for the purpose of sale, or for any other unlawful or illegal purpose. The so-

called Volstead Act, drastic though it is, does not make the mere possession of liquor a crime. Section 33 of Title II of the Act provides:

> "It shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only, and such liquor need not be reported."

Before the possession of liquor can be unlawful, it must appear that the liquor is possessed for the purpose of sale, or for some other purpose prohibited by the act in question. It is true that the same section of the Act provides that

> "the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used,"

—but this provision sets forth a rule of evidence and not a rule of pleading. It is an elementary rule that the words, "unlawfully, wilfully and knowingly," which are used in the first count of this information, are mere conclusions of the pleader, which tender no issue. No indictment or information is sufficient, unless it states facts which show that the defendant has been guilty of a crime, and no presumption or inference can be indulged in to support an otherwise defective pleading. To hold to any other rule would be to deprive a defendant charged with a violation of the National Prohibition Act of the fundamental right, also guaranteed by the Constitution, to be informed of the nature of the accusation against him. The so-called Volstead Act is a lengthy enactment, which makes unlawful a great

variety of acts never before inhibited by legislative enactment. If the pleader who drafts an indictment or information under that Act is permitted to merely plead that the thing done by the defendant was unlawful without setting forth any facts to show how, or in what manner the act was unlawful, or wherein its illegality consists, then the legislative power might just as well abolish all pleadings or formal accusations in prosecutions under this Act.

It is an elementary rule that where a statute uses generic terms or general expressions which do not in themselves inform the defendant of the particular thing charged, it is insufficient to charge the offense in the bald language of the statute, but that the indictment or information must descend to particulars and must set forth the acts constituting the offense alleged. This rule is well stated by Judge Dooling in United States v. Bopp, 230 Fed. 721, in which decision the earlier Federal decisions to this effect are cited. In view of the fact that this information does not allege how or in what manner the keeping of the liquor by the defendant was unlawful, we submit that the information does not state facts sufficient to charge this defendant with crime.

(b) Regardless of what provisions may be contained in the so-called Volstead Act, we contend that it is beyond the power of Congress to make the mere possession of liquor a crime, and that the National Prohibition Act, in so far as it attempts to make criminal the possession or personal use of liquor, is unconstitutional and void. Accordingly, we

submit, that an information such as the one in question, which merely charges the keeping of liquor, even though such an information is in conformity with the so-called Volstead Act, does not charge a crime, because the portion of the act upon which it is based is unconstitutional.

It will be conceded at the outset, we think, that in the absence of a constitutional amendment, Congress would have had no right to pass a prohibition act, such measures being exclusively within the reserved power of the states. Accordingly, Congress could go no further than the 18th Amendment empowered it to go. The Constitution of the United States is a grant of power, and the various departments of the Federal Government possess only those powers which are expressly or impliedly conferred on them by the Constitution.

South Carolina v. United States, 199 U. S. 437;
Martin v. Hunter, 1 Wheaton 304;
United States v. McCullough, 221 Fed. 288.

An act of Congress for the enforcement of a Constitutional provision is void, if it is broader in its terms than the Constitutional provision which it was enacted to enforce.

Karem v. United States, 121 Fed. 250; 61 L. R. A. 437.

Now, the 18th Amendment to the Constitution of the United States does what? It prohibits three things: (1) the manufacture; (2) sale; (3) trans-

portation of alcoholic liquor for beverage purposes. The possession and use of liquor for such purposes is not prohibited. Congress had the power, by virtue of this Amendment, to prohibit the manufacture, sale or transportation of liquor for beverage purposes, but it had no power to prohibit the mere keeping or possession of alcoholic liquor. Therefore, when Congress attempted in Section 21 of Title II of the Volstead Act, if it did so attempt, to prohibit the mere keeping of liquor and to denounce as a common nuisance any place where liquor was kept, it transcended the powers conferred upon it by the Amendment, and the Volstead Act is to that extent unconstitutional and void.

III.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE VERDICT.

The evidence introduced at the trial was manifestly insufficient to warrant a conviction for two reasons:

First: The uncontradicted evidence of the defendant shows that the apartment in which the arrest was made, and the liquor found, was his actual and bona fide residence. The defendant's testimony shows that he had rented the rooms in which he was arrested in anticipation of his approaching marriage, and that the liquor which was found by the officers was liquor which he had possessed before the National Prohibition Act went

into effect. Prior to the enactment of the Volstead Act the defendant was a saloonkeeper conducting what was known as the "Cadillac Bar", and when the drastic law became effective, he moved the remainder of his stock to his room in the Adair Hotel, reporting such removal to the proper officials. (Transcript of Record, page 53.) On the evening in question, his contention is that he was holding a little party to celebrate his approaching marriage, when the officers broke in and made the arrest. We feel somewhat tempted to ask, on reading the record, whether we are now living in the United States of America, in the twentieth century, or in the days of Cromwell, when the Puritans cut down the Maypoles, closed the theatres, and prohibited bear-baiting, not because it gave pain to the bear, but because it gave pleasure to the spectators. The evidence that the liquor was lawfully acquired before the Prohibition Act went into effect is uncontradicted, and was apparently conceded by the Government at the time of the trial. It will not avail the Government anything to contend that the evidence shows that the defendant was making illegal sales on the premises, because on the second and third counts of the information that charged the making of sales, the jury returned a verdict of not guilty. Therefore, the Government must stand or fall on the evidence that relates to *keeping* alone, which is the one allegation upon which the charge of maintaining a common nuisance is based. That the mere keeping and possession of liquor in the defendant's apart-

ment was not illegal is too plain to attempt to question. He had a right to possess it under the plain terms of the Volstead Act itself. (Section 33, Title II.) He likewise had a perfect right to remove it from his old to his new residence. This was decided by the Supreme Court of the United States in the recent case of Street v. Lincoln Safe Deposit Company, on January 5, 1921.

In that case the Supreme Court holds that an intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction, and the case likewise holds that a transportation of lawfully acquired liquors from a warehouse to the home of the owner is not such a transportation as is prohibited by the Prohibition Act.

Second: The evidence is absolutely insufficient to establish that the defendant was keeping a common nuisance, because the most that it shows was the possession and use of the liquor on one day. Before any place can be a nuisance, it must be common; it must have acquired a status. The information in this case does not charge that liquor was kept in the premises on more than one particular day, and the evidence shows only the one occurrence. The decisions are almost uniform to the effect that a single sale of liquor is not sufficient to constitute the place in which such sale is made a common nuisance. Thus, in State v. McIntosh, 98 Me. 397, 57 Atlantic 383, which was a prosecution under an

indictment charging the defendant with keeping and maintaining a liquor nuisance, it is held that:

> "One or more unlawful sales of intoxicating liquor in a place does not necessarily, and as a matter of law, make that place a common nuisance. The place must be habitual, commonly used for that purpose, before it becomes a common nuisance."

The same rule is laid down in

State v. Stanley, 24 Atl. 983;

Commonwealth v. Patterson, 138 Mass. 498.

To quote from the brilliant and witty opinion of Justice Robinson in Scott v. State, 163 NW 813:

> "One swallow does not make a summer; one love affair does not make a bawdy house. The house must be used for illegal and immoral purposes, the wrong must be common or it is not a common nuisance and the legislature cannot make it otherwise. It is perfectly absurd to say that the keeping of a house wherein one, two or three drinks are sold or given away is the keeping of a common nuisance."

A recent Federal decision to the same effect is United States v. Cohen, 268 Fed. 420. That case was a prosecution under the equity sections of the Volstead Act to enjoin the defendant from maintaining a common nuisance on his premises by the illegal sale therein of intoxicating liquors, and by the unlawful keeping for sale at and on said premises liquors which contained alcohol in quantities forbidden by the Act. It will be noted that the allegations of the bill in that case alleged sales and keeping for purposes of sales, whereas the first

count of the information in the case at bar charges nothing more than a mere keeping. In the course of a very learned discussion of the meaning of the nuisance provisions of the Volstead Act, the court says:

> "The word 'nuisance' has a well-defined meaning in the law, and a thing cannot be declared a nuisance by statute, and abated as such, when in fact it is obviously not a nuisance. The rule laid down by the Supreme Court of the United States upon this point is that—
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> " 'While the Legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed.'
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> Lawton v. Steele, 152 U. S. loc. cit. 140, 14 Sup. Ct. 502, 38 L. Ed. 385.
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> "This is clearly the farthest limits of the rule, so far as concerns the extent to which the Legislature may encroach on private rights, in the destruction, abatement, or damage of private property as a public nuisance. Further encroachment is forbidden by those provisions of the organic law having reference to the constitutional guaranty of due process of law and forbidding the taking of private property for public use without just compensation. Lawton v. Steele, supra; Austin v. Murray, 16 Pick. (Mass.) 121; Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394; Brown v. Perkins, 12 Gray (Mass.) 98.
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> "The extent of the encroachment upon the rights and property of the individual, permissible to the law-making bodies in the valid

exercise of the police power, has been always a most strongly mooted question. Those urging broader constructions have won much ground, but it has been surrendered grudgingly. Generally, in the valid exercise of the police power are included all things essential to the conservation of the public safety, public health, and public morals. But this sweeping general rule is modified by a consideration of the rights of the private individual. Hedging it about is the consideration that—

"'To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.' Lawton v. Steele, 152 U. S. loc. cit. 137, 14 Sup. Ct. 501, 38 L. Ed. 385.

"The Congress, therefore, must be deemed to have used the word in its usual and ordinary legal significance, and to have had in mind that it could not pass a law which had the effect to wipe out the constitutional rights of the citizen in private property

"The idea of either continuousness of existence of the things, or facts, or acts, which constitute the alleged nuisance, or the recurrence of such acts, so as to create damage, annoyance, discomfort, or inconvenience, is cannoted by the presence of the word 'use' in the common-law definition. Discussing a

very similar statute of the state of Kansas, the Supreme Court of the United States said:

" 'The statute is prospective in its operation; that is, it does not put the brand of a common nuisance upon any place, unless, after its passage, that place is kept and maintained for purposes declared by the Legislature to be injurious to the community. Nor is the court required to adjudge any place to be a common nuisance simply because it is charged by the state to be such. It must first find it to be of that character; that is, must ascertain, in some legal mode, whether since the statute was passed the place in question has been, or is being, so used as to make it a common nuisance.' Mugler v. Kansas, 123 U. S. loc. cit. 672, 8 Sup. Ct. 303, 31 L. Ed. 205.

"I conclude that Congress, by the use of the words, 'sold, kept or bartered' in violation of law, meant either habitually, or continuously, or recurrently so sold, kept, or bartered. I do not think that a single sale, without more, and with no evidence of the continuation or recurrence of law violation, or of facts strongly indicating either habitual sales, or long-continued violations, or such a recurrence of unlawful acts or sales as to colorably indicate that the criminal prosecutions and penalties provided by other parts of the act are inadequate to cope with the situation, would constitute a nuisance or warrant the interference of a court of equity by injunction; for in such case it is not the crime of selling liquor, or selling a single drink of liquor, by a given person, at a given place, which constitutes the nuisance, but it is the maintenance and use of the room, house, or place as a situs for the doing thereat of unlawful or criminal acts, which constitute the nuisance.

"If the Volstead Act is construed to mean that a single sale is sufficient to constitute a nuisance, I should seriously question its validity,

> for upon such a view we are met by the rule which forbids equity taking jurisdiction where an inadequate remedy at law exists, as also the rule that even Congress may not say a thing is a common nuisance, when in fact it is not. For a single sale, without more, and without other overt acts, can be punished by a fine or imprisonment, and a subsequent sale by both such fine and imprisonment. Such remedy was seemingly deemed sufficient, or at least sufficient punishment; otherwise, Congress would have made the penalty more severe. It is fairly well settled that equity will not enjoin the commission of a crime."

Clearly the indictment in the case at bar does not aver sufficient facts to charge the defendant with keeping a nuisance, and the evidence falls far short of showing that the wedding party in which the defendant participated was of such a character as to confer upon his apartment the status contemplated by the Act.

It is respectfully submitted that for the reasons herein set forth the judgment of the court below should be reversed.

Dated, San Francisco,
October 1, 1921.

CHAUNCEY F. TRAMUTOLO,
Attorney for Plaintiff in Error.